In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 644

JACOB J. FROHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury convicted petitioner of wilfully failing to file income tax returns for 1959 and 1960 in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to imprisonment for one year on each count to run concurrently. (Pet. 2.)

The evidence showed that petitioner's gross income from his business of developing and dealing in commercial real estate properties (Pet. 5) was $55,502.41 in 1959 and $36,522.50 in 1960 (Tr. 343–345). Prior to 1958 petitioner filed timely income tax returns (Tr. 487). His 1958 return, however, was not filed until 1962, after he had been contacted by a revenue agent (Tr. 515–516). His returns for 1959 and 1960 were not filed until December 11, 1965 (Tr. 14–15).

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Petitioner conceded at the trial that he had known the returns should be filed, but testified that he "just couldn't do it in time" and had not known that he could be prosecuted criminally (Pet. 22, fn. 1). The evidence also showed that petitioner in 1962 told a special agent that he had failed to file his returns because he did not have the money to pay the tax (Tr. 296–299).

Petitioner's principal contention is that admission of his 1962 statement violated his constitutional rights because he was not advised at the 1962 meeting of his right to counsel. There is no merit to this claim, or to petitioner's attacks on various of the trial court's rulings and on the constitutionality of 26 U.S.C. 7203. No further review of his conviction is justified.

1. *Miranda* v. *Arizona,* 384 U.S. 436, and *Escobedo* v. *Illinois,* 378 U.S. 478, do not require exclusion of petitioner's 1962 statements. The record shows that an attorney, Mr. Kuehn, accompanied petitioner to his 1962 meeting with the special agent. Petitioner's attendance at the meeting was wholly voluntary; no contrary claim is made. The agent advised petitioner that "he had a right not to answer any questions, if he so desired". Petitioner replied that he "did not intend to use that privilege" and would give the agents "anything [they] wanted" (Tr. 299).

Petitioner claims (Pet. 10–12) that Mr. Kuehn, although a member of the bar, was not competent to act as an attorney, and was not in fact petitioner's counsel. But Mr. Kuehn had previously told the agent that he was petitioner's attorney, and his activities were consistent with such a status. We submit

that in these circumstances *Escobedo* and *Miranda* would not require a warning even if the interview had taken place while petitioner was in custody.

But petitioner, when interviewed in 1962, plainly was not in custody, or deprived of his freedom in any way. Therefore, whatever Mr. Kuehn's capacity was, petitioner was not subject to the type of compulsion that the rules of *Miranda* and *Escobedo* were designed to prevent, and no warning was required. The courts of appeals in six other circuits are in accord. *Schlinsky* v. *United States,* decided June 6, 1967, 19 A.F.T.R. 2d 1597 (C.A. 1), certiorari denied, No. 436, this Term; *United States* v. *Mancuso,* 378 F. 2d 612, 619 (C.A. 4), reargued *en banc* October 4, 1967; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius,* 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, No. 372, this Term; *United States* v. *Mansfield,* decided July 26, 1967, 20 A.F.T.R. 2d 5233 (C.A. 7), petition for certiorari pending, No. 723, this Term; *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[2]

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[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States,* 377 F. 2d 535 (C.A. 5).

[2] *United States* v. *Kingry* (N.D. Fla.), 19 A.F.T.R. 2d 762, and *United States* v. *Turzynski* (N.D. Ill.), 20 A.F.T.R. 2d 5004, on which petitioner relies (Pet. 8), have been discredited by court of appeals' decisions in their respective circuits. The weight of district court opinions agrees with the views expressed in the courts of appeals. See *United States* v. *Gleason,* 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Fiore,* 258 F.

2. Petitioner's contention (Pet. 12–17) that he was deprived of a fair trial is based on three separate actions of the court during trial. First, it is said (Pet. 13–14) that the trial judge erred in excluding evidence that substantial default judgments had been entered against petitioner. The relevance is said to be that this tended to show "a pattern and habit of negligence by petitioner in other affairs of great importance to him" (Pet. 13), thus, presumably, showing a want of wilfulness. The connection is tenuous at best. The trial court found the evidence remote and irrelevant, and the court of appeals agreed (Pet. 32). There is no basis for further review of the trial court's discretionary authority to determine what evidence is sufficiently pertinent to be admissible. See, *e.g.*, *Cotton* v. *United States,* 361 F. 2d 673, 676 (C.A. 8); *Wilson* v. *United States,* 250 F. 2d 312, 325 (C.A. 9).

Nor was it error, as petitioners claim (Pet. 14), to exclude evidence of the methods and computations used in preparing petitioner's 1960 return. The purpose of the evidence was to show that petitioner had a loss instead of a profit for that year. But whether it was a profit or loss would not be relevant to the question of whether petitioner had sufficient gross income to require the filing of the return. See 26

Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D. N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves* (S.D. N.Y.), decided April 28, 1967, 67–1 USTC, par 9412; *United States* v. *Basil*, 268 F. Supp. 1018 (S. Fla.); *United States* v. *Bohrod* (W.D. Wis.), decided December 14, 1965, 67–2 USTC, par. 9622.

U.S.C. 6012(a)(2). At most, therefore, the admissibility of the evidence was a matter for the trial court's discretion, *Cotton* v. *United States, supra,* and no abuse is shown. Moreover, this contention goes only to Count II—relating to 1960—and even if the conviction on that count were reversed the sentence would still be fully supported by the judgment on Count I.

The third objection is to two questions that the trial judge asked a witness, an accountant who had done work for petitioner (Pet. 15–16). The trial court's purpose was to bring out that taxpayers may hire accountants to prepare their returns and may get extensions of time, when needed, for filing. The judge did not thereby become "a witness against petitioner expressing an opinion on the critical issue of the case" (Pet. 16). As the court of appeals noted, "For the most part the information elicited from the witness eventually came in anyway" (Pet. 30). In addition, the trial court instructed the jurors that if they thought, at any time during the trial, that the court indicated any opinion with respect to the facts, they should disregard it because such was not the court's purpose; and that any opinion the court might have was not conclusive on the jury, which was "at perfect liberty to disregard anything of this sort" (Tr. 550–551).

3. Petitioner's final argument is that 26 U.S.C. 7203 is unconstitutional on its face. This claim, made for the first time on a petition for rehearing in the court of appeals (Pet. 19), is in substance a call for reconsideration and overruling of *United States* v. *Sullivan,* 274 U.S. 259.

Petitioner was convicted under that part of the statute which makes unlawful a wilful failure "to make a return" required by the Internal Revenue Code. Sullivan had been convicted of the same crime. He claimed that the Fifth Amendment proscription of compelled self-incrimination protected his failure to file, because filing might have disclosed that his income resulted from unlawful activity. This Court rejected the contention for two reasons (*Albertson* v. *SACB,* 382 U.S. 70, 79):

> *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second,* that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim. * * *

Here, the claim of the Fifth Amendment right is even more frivolous, for there is no suggestion in the record, or for that matter any claim, that the answer to any question on the return could have incriminated petitioner in any way. Further, just as Sullivan did, petitioner claims a right to make himself, rather than a tribunal, judge of the merits of his claims to constitutional protection.

There is nothing in petitioner's assertion that the grant of certiorari in *Costello* v. *United States,* 383 U.S. 942, No. 3, this Term, should prompt a reconsideration of *Sullivan.* The issues there and in the associated cases of *Marchetti* v. *United States,* No. 2, this Term, and *Grosso* v. *United States,* No. 12, this

Term, are whether the registration and payment requirements of the wagering tax laws violate the Fifth Amendment. The argument is that those requirements compel an admission that a person received income from wagering—an activity unlawful under State law. In *Sullivan,* as well as here, an income tax return could have been filed without identifying the source of income.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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[3] Petitioner was not convicted under the portion of Section 7203 that he quotes (Pet. 18), which makes unlawful a failure to "supply any information" required by the Internal Revenue Code. We presume, as was said in *Sullivan,* "[i]f the form of the return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U.S. at 263.

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